Combination of Arbitration and Mediation

-Arb/Med

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(I)

Existing Facts

1. There are two arguments with regard to the combination of arbitration and mediation (Arb/Med), one supporting Arb/Med and the other opposing it. These two arguments have been fighting with each other for years. The present situation is that the argument supporting Arb/Med is getting the upper hand.

Evidence:

More and more articles and books supporting Arb/Med are written and published while less and less publications opposing Arb/Med can be seen.

2.Arb/Med is enthusiastically welcomed by the international business community.

3.There is no existing laws and rules which expressly disallow Arb/Med. On the countrary, more and more laws and rules set forth provisions encouraging and supporting Arb/Med, for instance, the laws and/or rules of China, Hong Kong SAR, Argentina, Brazil, Mexico and some other Latin American countries, Bermuda, Germany, the Netherlands,

Switzerland, France, Austria, Slovenia, Hungary, Croatia, some of the former CMEA countries, Australia, Canada, some parts of the USA, WIPO, etc.

(II)

Experts' Opinion

Prof. Clive M. Schmitthoff (UK):

The principle of distinguishing arbitration from mediation should be maintained. However, such distinction should not be exaggerated. It is not practical to artificially distinguish the function of the arbitrator and the mediator, particularly, in the resolution of disputes of big business transactions. The distinction may delay the final resolution of the dispute and increase unnecessary expenses, because if mediation fails, the case will be heard anew by another person who is not familiar with the dispute. Therefore, the parties may freely abandon such distinction provisions set forth in the mediation and arbitration rules. If mediation is not successful, the parties should be allowed to reach an agreement that the mediator may continue to participate in the resolution of the dispute, but he must appear as an arbitrator.

Dr. Gerold Herrmann (Germany):

When discussing the UNCITRAL Conciliation Rules, he pointed out that the parties might alter Article 19 of the Rules by agreement and that the failure of the earlier attempts to conciliate the dispute or the

conciliator's familiarity with the dispute might not be deemed as an unbeneficial condition, but rather a kind of wealth. Such alteration should be acceptable.

Hong Kong experts:

In 1989 the Law Reform Commission, in considering the adoption of the UNICITRAL Model Law for Hong Kong, made suggestions for the improvement of the conciliation section in the Ordinance. The specialist sub-committee which advised the Law Reform Commission had been impressed by the Chinese approach of combining conciliation and arbitration and thus it was thought sensible to give the parties an option, if they both agreed, to use this procedure. Section 2B in the Arbitration Amendment (No.2) Ordinance 1989 simply states that if both parties agree, and for so long as they agree, a person appointed arbitrator may be asked to attempt to conciliate the dispute. For the purposes of the conciliation he can see the parties separately and all matters disclosed to him are to be confidential. The Section then goes on to state that if the conciliation fails, then he resumes his role as arbitrator and has then to disclose to each party, material matters which had been disclosed in confidence by the other. There is then a saving clause which prevents his award being objected to on the basis of anything that he did whilst acting as conciliator.

This then is the Chinese approach. Who better, say they, than the failed conciliator to be the arbitrator. The western approach, one imagines, will be very different. How can a person who has acted as conciliator, seen the parties separately, listened to them baring their souls in private, be the person who should then make a proper determination in the course of an arbitration? In any event, they would say that the parties would be reluctant to disclose their true case to the conciliator for fear that he may end up being the arbitrator. These objections are well understood, but nevertheless it was considered that the parties should be given the option of using this procedure if they wanted to.

Nobody is going to be forced to use it. The members of the specialist sub-committee thought that there might be circumstances where the parties would want to use this procedure. Provided they have full confidence in the person whom they have appointed as arbitrator/conciliator, it is highly possible that, with a genuine endeavour to conciliate the dispute, each would be able to disclose his case without fear of the consequences. The obligation is that the arbitrator should disclose any material information given him in confidence during the period of conciliation. The sub-committee put it thus:

> We accept that (post failure to settle disclosure of material facts) may inhibit frankness, but we think this is better than compelling an arbitrator to try and ignore material information. We do not anticipate procedural difficulties. If the arbitrator were to send to each party a list of the information he regarded as material and disclosable and then considered that party's views before acting, the chance of error should be slight. We therefore think that this framework should enable an arbitrator fairly and effectively to conciliate if, and so long as, that is what the parties want, without misconduct, and without impairing his capacity to make an award thereafter.

Whether this provision will be used remains to be seen. It is another option given to consumers and it is for them to decide whether in appropriate cases its use is desirable. In this respect it is to be noted that the combination of mediation and arbitration by the American Arbitration Association has proved successful.

The Rt. Hon. Sir Michael Kerr (UK):

In England we have a new Arbitration Act 1996 based on the Model Law. It preaches total flexibility and relative informality. Section 1 states that the Act is founded upon and is to be construed in accordance with a number of principles, including the axiom that 'the parties should be free to

agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest'.

Some years ago, Sir Michael Kerr himself conducted a hearing in Beijing under ICC rules and in the course of the hearing he mediated the dispute and he did succeed in that mediation.

Mr. Mclaren and Mr. Sanderson (USA):

...the wonderful ADR which has been created by linking together the two methods to resolve disputes makes the whole mechanism more efficient than using only one of the methods to resolve the disputes...

Prof. Pieter Sanders (Holland):

Also in arbitration, like in court proceedings, arbitrators may at any stage of the proceedings order the parties to appear in person for the purpose of providing information or for attempts to arrive at a settlement. This is *expressis verbis* stated in the Dutch arbitration law. Although the Bill does not contain a similar provision, it can hardly be doubted that the tribunal has such power. It may be covered by the general provision of clause 33 that the tribunal 'shall adopt procedures suitable to the circumstances of the particular case'. This might include a meeting with the parties to discuss possibilities of settling the dispute.

In case arbitrators take the initiative to order such *a meeting to discuss possibilities of a settlement* it seems to me that it is not excluded that arbitrators would invite the parties to use one of the available means of ADR to settle their dispute. Such an invitation is not outside the mission of the arbitrators. Arbitration is a service industry in the interest of the parties. Why should

arbitrators not suggest, in appropriate cases, to use one of the available means of ADR? When settlement is discussed arbitrators themselves are in a delicate position. They cannot freely express their opinion on what the outcome of the arbitration will be in case no settlement is reached. The conciliator enjoys much greater freedom. He may make proposals for settlement and may also express his own neutral opinion of what he expects the outcome might be if no settlement is reached. Of course parties have to agree to interrupt the arbitral proceedings and to embark on an attempt to settle under a set of well drafted conciliation rules. However, the authority of the arbitral tribunal may make them prepared to accept the invitation.

Mr. Arthur Marriott QC (UK):

Mr. Marriott is a supporter to ADR and Arb/Med if my understanding is correct, and he also supports litigation/mediation (Lit/Med). He writes:

...will the judge intervene?

Case Management is at the heart of Lord Woolf's proposals; and, if they are to work, English judges will have to be much more interventionist than hitherto in controlling procedures, curbing delay, capping costs and encouraging settlement. Some degree of procedural obligation or compulsion may be necessary. Despite the clear and emphatic direction of Lord Templeman and Lord Roskill in Ashmore v Lloyds, English judges at first instance have not intervened and have not exercised their powers of control.

This is contrary to the experience in many civil law countries, such as, Germany and Switzerland where there is a procedural obligation on judges periodically to promote settlement. In Germany, procedural rules compel judges to do so at first instance and on appeal. The judge may make a specific proposal and will proceed to try the case if the proposal is rejected. As yet there is no power in the court to order mediation, though there is now a debate in Germany as to the desirability of mandatory arbitration in family cases. German courts whilst less troubled by delay than we are (perhaps due to the

fact that the Germans have significantly more judges per head of population than we do), are concerned by rising costs. In a recent speech of the German Minister of Justice to the 1995 Deutscher Richtertag, two solutions were advocated. Firstly, that out-of-court settlement should be further promoted and, secondly, that the internal organization of the courts should be modernized, especially by introducing service centers-shades of Lord Woolf. A feature of German fee rules which may interest the Law Society is the provision of increased fees if a case settles.

In Switzerland there is also a trend to resolve civil disputes by settlement. Some civil procedure rules expressly encourage this practice. The 'Zü rcherische Zivilprozessordnung', for example, imposes in some cases a compulsory pre-litigation conciliation procedure. Art. 62 of the Zürcherische Zivilprozessordnung further stipulates that the judge can at any time summon the parties to attend a 'Vergleichsverhandlung' (conciliation hearing).

The conciliation hearing is usually ordered once the relevant issues in dispute and the applicable legal rules have been determined, after the exchange of the initial pleadings, but before any evidence has been heard.

At the conciliation hearing the judge sets out his understanding of the relevant facts, carries out a detailed legal analysis and concludes with his proposal for a settlement between the parties.

An increasing number of cases are settled by conciliation as the figures released by the Zürich Commercial Court, one of the biggest in Switzerland, demonstrate. Conciliation is not ordered in every case. However, where it is, a settlement is reached in 80% of all cases.

Prof. Michael E. Schneider (Switzerland):

Prof. Schneider encourages and supports Arb/Med. For details, please refer to his article "Combing Arbitration with Conciliation" published in

ICCA Congress Series No.8, p.57-99.

Prof.Tang Houzhi (China):

He is a supporter of Arb/Med. For details please see ICCA Congress Series No. 8, p.101-119.

Mr. Alan Shilston (UK):

He is one of the principle advocates of Arb/Med. He supports Arb/Med although he opposes caucusing.

Mr. Neil Kaplan QC (UK):

He supports Arb/Med with a condition that information from one party must be disclosed to the other party. (See "Is there an Expanding Culture that Favors Combining Arbitration with Conciliation or Other ADR Procesdures?", ICCA Congress Series No. 8, p.101-119.

Mr Michael Hoellering (USA):

In a highly informative Report which provides valuable insights into dispute resolution in China and enactments around the globe, Prof. Tang Houzhi concludes that yes- there is now an expanding culture that favors combining arbitration with conciliation in the resolution of international commercial disputes. Michael Schneider, in his own comprehensive survey of existing practices, finds ample support for this proposition but suggests that it may be premature to speak of a general trend favoring the combination of these two dispute resolution techniques. My own comments on the growing interaction between arbitration and mediation are based on the experience of the American Arbitration Association (AAA)...

Beyond the field of construction, and throughout the general business community, appreciation of mediation has now reached the point that it is

standard AAA policy to inform disputants of its availability at the beginning of every arbitration, and to provide a mediation "window" which the parties can take advantages of at any stage of the arbitration process. How, when and whether mediation will take place will depend entirely on the will of the parties. For example, in one recent case, the parties agreed to arbitrate one of three related disputes, then to mediate the remainder of the controversy based on the initial award, before proceeding to arbitrate any still unresolved disputes. In another, arbitration was suspended pending the conduct of parallel, ultimately successful mediation efforts. In one huge environmental dispute, a limited period of mediation was agreed to, to be followed promptly by arbitration should mediation not succeed. In still another arbitrated case, in which liability was determined in a series of interim awards, the chairman of the arbitral tribunal was asked to mediate the damage issue. He did so, successfully, after resigning as chairman of the tribunal. Each of these examples illustrate a combination of mediation with arbitration but as separate processes in which, unlike the practice in China described by Prof. Tang, different neutrals perform the arbitral and mediation functions.

In the last decade, a great surge of interest in mediation has further expanding use of this time tested technique. During 1995 a total of 1473 mediation cases were administered by the AAA, and the numbers continue to grow. Currently, in more than 10% of the cases filed with the AAA's new International Dispute Resolution Center, the parties are seriously considering or engaging in mediation, before proceeding to arbitrate. A large part of this openness to mediation and the 85% settlement rate can be

attributed to the voluntary nature of the process, and a party's right to end its participation at any time, without fear of repercussion.

In accessing why Med-Arb is not popular in the United States, several observations can be made. Firstly, that the freedom to engage in the process but also to walk away from it are critical to effective mediation. Secondly, that disputants are reluctant to divulge confidential information to a neutral who may later use it against them at the arbitral stage. Where they have participated in a med-arb procedure, they may later regret it and seek to avoid its consequences. To guard against that eventuality in ongoing AAA cases, the parties are asked to execute a stipulation confirming that if mediation does not succeed, the arbitrator nevertheless retains jurisdiction to render a final and binding award. The same general concern is addressed in the International Bar Association's Rules of Ethics for International Arbitrators as follows:

> "Although any procedure is possible with the agreement of the parties, the arbitral tribunal should point out to the parties that it is undesirable that any arbitrator should discuss settlement terms with a party in the absence of the other parties since this will have the result that any arbitrator involved in such discussions will become disqualified from any future participation in the arbitration."

With respect to concerns of natural justice, i.e., a party's difficulty of responding to adverse information conveyed in private caucus of which it is not aware, the solution of full disclosure is bound to have a chilling effect on the spontaneity so important to successful mediation. If the modern practice is to abolish caucusing altogether it seems counter productive to this

commentator, for it is precisely through the sharing of confidences that many complex human problems are resolved. Finally, the quite extraordinary power of a mediator-arbitrator has given parties a pause, as pressure tactics and strong advocacy by a mediator of a particular solution are not unheard to events. This too is recognized by the AAA's Code of Ethics for Arbitrators in Commercial Disputes which provides that 'an arbitrator should not exert pressure on any party to settle.'

If the separation between mediation and arbitration represents the norm, experimentation and differing interactions between these two basic dispute resolution techniques is what the American ADR movement is all about. A prominent example referred to in the Schneider report is the *IBM-Fujitsu case*, one of the largest ever administered by the AAA, which involved hundreds of millions of dollars and complex computer intellectual property issues. In that unique international case, after resignation of the presiding arbitrator, the party-appointed arbitrators were authorized by the parties to act as mediators to probe the underlying interests and encourage an expedited, flexible and creative arbitration process. Following some considerable efforts, mediation resulted in resolving two major areas of disagreement – those relating to the scope of the copyrights and the amount of "external information" to be exchanged. Left for the arbitrators to decide were monetary issues, and how to ensure the future secure exchange of highly sensitive proprietary information. As subsequently discussed by one of the arbitrators, the case had several fascinating aspects:

"In this case, the parties gave arbitration panel considerable discretion to design the process. We were able to choose different dispute settlement

techniques for different problems or issues. Broadly speaking, we acted as mediators in developing the framework for the resolution, and as arbitrators in implementing that framework. In addition, we presided over meetings of responsible executives of both parties using a mini-trial format. We also held independent fact finding meetings with customers. And we resolved some claims with 'final offer' arbitration – the technique used in major league baseball to establish disputed salaries for ball players. It was a dynamic process."

Conclusion: AAA experience over the last twenty-five years makes clear that mediation, once again, has re-emerged as a popular private dispute resolution technique. Both in the domestic and international spheres, it is being increasingly used in combination with arbitration to facilitate prompt and effective dispute settlement. While its combination with arbitration can take on different forms, consistent with the wishes of the parties and personal predilection of a given neutral, it continues to be conventional wisdom that arbitration and mediation operate best when employed as separate processes, since each has its own purpose and ultimate morality.

Ms. Tinuade Oyekunle (Nigeria):

She seems to disencourage Arb/Med because the Nigerian Arbitration Act 1990 does not support a due role for a person to act as conciliator and arbitrator. She said, "if this happens, enforcement problems may be cause."

Sir Lawrence Street (Australia):

He strongly supports the concept that disallow the same person who has mediated the case may act as arbitrator in the subsequent arbitration process. He points out that the method of combining arbitration with mediation

inevitably distorts and hinders the mediation procedure and that it is confronted with great risk in addition to personal unpleasant reflection. He thinks even if the parties agree to use the method of combining arbitration with mediation, they should not appoint one person to act for two persons and a person who accepts such an appointment is not wise at all.

Mr. Martin Hunter, QC (UK):

He strongly opposes Arb/Med. He says it is clearly inappropriate for the arbitrator to resume his function as an arbitrator once he has caucused with one of the parties and it is impossible in practice. (Note: Some years later, Mr. Hunter was appointed as arbitrator in a CIETAC case and he did mediate the dispute during the arbitration proceedings, although he did not caucus.)

From the above, it reveals the fact that the argument supporting Arb/Med has got the upper hand over the other argument opposing Arb/Med.

(III)

Two Concerns

1. Against natural justice or due process

This problem can be resolved by disclosing all information obtained from one party to the other party. The arbitrator-turned-mediator may tell the party in the course of caucusing that he may not or should not give any substantive information which he does not want the arbitrator-turned-mediator to disclose to the other party.

2. The same person to mediate and decide the same case

Some people say it is not justified to let the person who has known everything of the case to make an arbitral award on the case.

Other people including me say it is the best to have the person who has known everything of the case to make an arbitral award on the case.

(IV)

Some Mediation Techniques

1. In CIETAC practice, the arbitrator-turned-conciliator never makes a concrete settlement proposal before the facts of the case become 90% clear and the parties have known where they are.
2. Usually, a concrete settlement proposal is made at the late stage of conciliation when the gap (difference) between the parties has been narrowed to the minimum extent.
3. The CIETAC arbitrator, if conciliation fails, has never used any information obtained in the process of conciliation as an element for making the arbitral award. If one of the reasons to make the award is based on information obtained from one party and not disclosed to the other party, the other may challenge the award, saying that no opportunity has been given to the other party to argue. In such a case, the court will refuse the enforcement of the award.

(V)

Advantages of Arb/Med

1. Save a separate conciliation procedure
2. Save time, money, energy, etc.
3. High rate of successful conciliation
4. Secured enforceability of the successful outcome of conciliation

(VI)

The arguments are still going on. I am rather confident that the argument supporting Arb/Med will win in the near years to come.